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ORIGINAL

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VIA HAND DELIVERY

Docket No. 02-6
FILED/ACCEPTED

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

OCT 29 2010

Federal Communications Commission
Office of the Secretary

Re: In the Matter of Request for Review of a Decision of the Universal Service Administrator, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Lazo Technologies, Inc., et al., File Nos. SLD-360412, 360904, 369205, 369537.
Submission of Additional Argument
Notice of Oral Ex Parte Presentations

Dear Ms. Dortch:

This is to provide additional information to the Bureau and the Commission to assist it in expediting their grant of relief to the Petitioners in this proceeding, and to update certain administrative matters.

Introduction

Petitioners filed a Petition for Reconsideration of Bureau Order ("Petition"), on September 11, 2009, and a Supplement and Errata to Petition for Reconsideration ("Supplement"), on September 25, 2009 (together "Appeal"). Petitioners requested expedited treatment of its Appeal, yet it is now more than one (1) year later and no decision has been rendered in this case. Petitioners are being denied justice due to the lack of any ruling – they have not been granted the relief to which they are clearly entitled, nor do they have the opportunity to appeal a denial. While frustrated by inaction, Petitioners do recognize that the issues they raise are unique, and that while the Petitioners are clearly entitled to the relief they request, the Commission must be careful not to expand precedent to provide an opportunity for

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exploitation by parties who attempt to defraud the Schools and Libraries Universal Service Support Mechanisms.

Commission Precedent

As discussed in the Supplement, the *Tennessee Order*¹ establishes the relevant precedent that should be applied to this case. Under the clear ruling of the *Tennessee Order*, which was almost factually identical to the instant case, the service providers were provided with a new SPIN number so that they could continue to provide service under the contract and receive payment. This approach terminated any claims to payments that may be made by parties engaged in fraud under the original SPIN number.

To assist staff who have joined the Commissioner's offices since last September, we restate below the relevant portions of the Supplement that discuss the *Tennessee Order* so that staff does not have to locate the originally filed Supplement:

In the *Tennessee Order*, ENA used various telecommunications and network *subcontractors* in its work under the E-rate contract. *Id.* at 13584. When a criminal investigation began into the relationship between ENA and a former Tennessee governor, USAC delayed further processing of the corresponding funding request. *Id.* at 13584-585. Tennessee, in turn, requested a substitute service provider to take ENA's place so that the subcontractors who were innocent of any wrongdoing could receive the payments owed to them. *Id.* ENA itself would receive no payments until the investigation was resolved. *Id.* The Commission permitted such a substitution in service providers noting that delays in funding contracts "may have the effect of penalizing parties that are in no way implicated in potential wrongdoing." *Id.* at 13586587. The Commission observed that "The relevant subcontractors have provided service in good faith to the schools of Tennessee, in reliance on the contractual agreement between ENA and Tennessee." *Id.* at 13587.

The same is true of Petitioners. Petitioners were among the various subcontractors used by MSE. At no time did any of them engage in any wrongdoing, nor were they ever suspected of any wrongdoing. Each Petitioner performed its work to completion, in good faith. As in the

¹ *Request for Immediate Relief Filed by the State of Tennessee, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, 18FCC Rcd 13581, 13584-589 (2003) ("*Tennessee Order*").



Tennessee Order, permitting payments to the innocent subcontractor Petitioners will avoid the effect of penalizing Petitioners when they are not implicated in wrongdoing. *See, id.* As Wong and Bohuchot already have been convicted and debarred, and MSE is no longer a Consortium member, there is no danger of the wrongdoer, MSE, receiving any payments rightfully earned only by Petitioners. As with ENA in the *Tennessee Order*, there is no risk of payments going to the wrongdoer MSE. *See id.*

Supplement, page 7. Petitioners here deserve the same treatment as that provided the subcontractors in the *Tennessee Order*. The Commission and USAC should not be “penalizing parties that are in no way implicated in potential wrongdoing.”

Additional Precedent Under Federal Law

In granting relief to the Petitioners, the Commission will not be establishing new precedent that could open the door for claims of relief by other parties who do not deserve relief, but will be simply applying legal principles established under the *Tennessee Order*, and recognized by federal courts in government contracts cases that raise issues similar to those raised by the Petitioners.

Petitioners have raised *quantum meruit* arguments in their Appeal. The Petitioners fully performed under a contract they believed was valid, binding and lawful. Petitioners even undertook their own due diligence, and reviewed the favorable results of government audits. It was only after they had successfully completed all of the work required by them under the contract that the government, through USAC, determined that the contract was void due to the unlawful actions of third parties.

The government and the DISD had already received, however, all of the benefits conferred by the contract. As the Federal Circuit has repeatedly held, “it would violate good conscience to impose upon the contractor all economic loss from having entered an illegal contract.” *United Pacific Insurance Co. v. United States*, 464 F.3d 1325, 1333 (Fed. Cir. 2006) quoting *United States v. Amdahl*, 786 F.2d 387, 393 (Fed. Cir. 1986). In instances where a contract is declared void or illegal after the work has been performed and the government has received the benefits of the contract, the courts will find an implied-in-fact contract and will grant *quantum meruit* relief. The court in *United Pacific*² endorsed the principles in the *Amdahl* case by recognizing that

² The Court in *United Pacific* denied recovery to the plaintiff surety, but only because a valid contract was in place so the principles of implied-in-fact contracts and *quantum meruit* were not before the Court.



Where a benefit has been conferred by the contractor on the government in the form of goods or services, which it accepted, a contractor may recover at least on a quantum valebant or quantum meruit basis for the value of the conforming goods or services received by the government prior to the rescission of the contract for invalidity. The contractor is not compensated under the contract, but rather under an implied-in-fact contract.

Id. (emphasis added by court). The court also recognized that “... *it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it.*” *Id.* (emphasis added by court).

The Petitioners are entitled to relief under Commission precedent, and under established federal law. The Petitioners request that the Bureau “expedite” this proceeding and issue its decision so that Petitioners are not harmed further by having performed under contracts and provided benefits to the government at their own expense – only to not be fully compensated. Every day of delay is harmful to Petitioners.

Disclosures

The Petitioners also seek to ensure that the record contains notice of any meetings or contacts that may have inadvertently been unreported. While not substantive in nature, Petitioners make the following disclosures out of an abundance of caution.

On October 28, 2009, representatives of the Petitioners met with Priya Aiyar, Legal Advisor for Wireline Competition and International Issues to Chairman Genachowski; Christine D. Kurth, Policy Director & Wireline Counsel to Commissioner McDowell; Jennifer Schneider, Broadband, Wireline and Universal Service Legal Advisor to Commissioner Copps; Christi Shewman, Acting Legal Advisor for Wireline, Universal Service and Consumer Issues to Commissioner Baker; and Carol Simpson, Acting Legal Advisor, Wireline and Broadband Issues to Commissioner Clyburn. The purpose of the presentations were to introduce the principals of each of the Petitioners to representatives of the offices of each Commissioner and the Chairman, to reiterate certain points already made in their Petition for Reconsideration and the Supplement and Errata to the Petition for Reconsideration, and to respond to any questions that representatives might have regarding Petitioners’ filings and the factual background giving rise to the filings. No matters in addition to these already disclosed in filings were discussed.

At various times, Mr. Tom Lazo has sent status request e-mails to Ms. Gina Spade. These consist only of status updates, and do not contain any substantive argument or discussion, nor do they include matters outside of the public filings made by Petitioners in this case.



Change in Contact Information for Counsel

Please also note that Counsel for Petitioners has changed law firms and is now a partner at Loeb & Loeb, 601 Pennsylvania Ave., N.W., Suite 900 South, Washington, D.C. 20004; 202-618-5015; wsteimel@loeb.com.

Thank you for your continued consideration of this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Walter Steimel, Jr.', written over a horizontal line.

Walter Steimel, Jr.
Counsel for Petitioners

cc: Zac Katz, Legal Advisor to Chairman Genachowski
Christine Kurth, Policy Director to Commissioner McDowell
Margaret McCarthy, Policy Advisor to Commissioner Copps
Brad Gillen, Legal Advisor to Commissioner Baker
Angela Kronenberg, Acting Legal Advisor to Commissioner Clyburn
Ms. Ann Stevens, Deputy Division Chief (via e-mail)
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